COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

BARNSTABLE, SS 2019 SITTING

2018-P-1383

COMMONWEALTH
Appellant
V.

ALEXA FENCHER
Defendant-Appellee

ON COMMONWEALTH'S APPEAL FROM THE ALLOWANCE
OF A MOTION TO SUPPRESS
BY THE HONORABLE GARY NICKERSON
JUSTICE OF THE BARNSTABLE COUNTY SUPERIOR COURT

BRIEF OF APPELLEE ALEXA FENCHER

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1. WHETHER OR NOT THE HEARING JUDGED ERRED WHEN HE APPLIED FACTS, AS HE FOUND THEM, TO THE LAW, WHEN HE HELD THAT THE POLICE DID NOT HAVE PROBABLE CAUSE TO SEIZE THE DEFENDANT'S CELL PHONE AT THE TIME IS WAS SO SEIZED.

2. WHETHER OR NOT THE COMMONWEALTH MET THEIR BURDEN BY MAKING A SHOWING THAT THE WARRANTLESS SEIZURE FELL WITHIN THE NARROW CLASS OF PERMISSIBLE EXCEPTIONS TO THE WARRANT REQUIREMENT.

DEFENDANT'S OBJECTION TO THE EXHIBIT PORTION OF THE COMMONWEALTH'S STATEMENT OF THE CASE[1]

DEFENDANT'S OBJECTION TO THE COMMONWEALTH'S STATEMENT OF FACTS

The Defendant objects to the Commonwealth's recitation of facts as follows: the Commonwealth's allegation fact on page 6 of their brief, that the record at (1/30) indicates one of the officers observed what appeared to be bloody handprints on the rear driver's side door.(1/30). This is not the verbatim statement of the testifying officer.

[1] The Defendant makes the following corrections to the Commonwealth's exhibit citations: Commonwealth's Volume 2 is actually dated May 25, 2018 not May 24, 2018 and Volume 3 is actually dated July 19, 2018 not July 24, 2018. The references in the Commonwealth's Record Appendix table of contents are incorrect. The Judge's Findings are not in the record appendix at page 34. Page 34 through 121 of the Record Appendix is the transcript of the Defendant's police interview. The Judge's Findings begin at page 122.

Nowhere on page 30 of Exhibit 1, does the testifying officer state that he observed what appeared to be "bloody handprints".

Additionally, the Commonwealth's allegation of fact on page 4 of their brief, indicating that the record at (2/28, 117 and 118 indicates that the vehicle was registered to the Defendant, is not a verbatim statement of the officer's testimony. The officer does not state on any of those referenced pages that he had obtained information that the vehicle was registered to the Defendant, only that he had found that the plate associated with Alexa Fencher (2/28) and that there were two names associated with the vehicle and one of them was Alexa Fencher age 21. (2/118)

A. STANDARD OF REVIEW

In reviewing a ruling on a motion to suppress evidence, we accept the judge's subsidiary findings of fact absent clear error. The weight and credibility to be given oral testimony is for the judge. See Commonwealth v. Yesilciman, 406 Mass. 736, 743 (1999), and cases cited. The courts "independently review[] the correctness of the judge's application of constitutional principles to the facts found." Commonwealth v. Eckert, 431 Mass 591, 593 (2000). The courts accord "substantial deference" to the judge's

ultimate findings. Commonwealth v. Monteiro, 396 Mass. 123, 131 (1985), citation omitted. "On a motion to suppress, '[t]he determination of the weight and credibility of the testimony is the function and responsibility of the judge who saw the witnesses, and not [the appellate] court." Yesilciman, supra, citations omitted. "The clear error standard is a very limited form of review. . . . Where there has been conflicting testimony as to a particular event or series of events, a judge's resolution of such conflicting testimony invariably will be accepted." Yesilciman, supra, citation omitted.

"The ultimate legal conclusions to be drawn from the subsidiary findings of fact, however, are matters for review by this court." Commonwealth v. Robinson, 399 Mass. 209, 215, (1987). See Commonwealth v. Carr, 458 Mass. 295, 298-299 (2010).

"We review de novo any findings of the motion judge that were based entirely on the documentary evidence, i.e., the recorded interviews of the defendant. See note 4, *supra*. We accept other findings that were based on testimony at the evidentiary hearing and do not disturb them where they are not clearly erroneous." Commonwealth v. Thomas, 469 Mass. 531, 539

(2014), citing Commonwealth v. Tremblay, 460 Mass. 199, 205 (2011).

ARGUMENT

1. WHETHER OR NOT THE HEARING JUDGE ERRED WHEN HE APPLIED FACTS, AS HE FOUND THEM, TO THE LAW, WHEN HE HELD THAT THE POLICE DID NOT HAVE PROBABLE CAUSE TO SEIZE THE DEFENDANT'S CELL PHONE AT THE TIME IS WAS SO SEIZED.

The Defendant maintains that the hearing judge did not err, when he applied the law to the facts as he found them, when he held that specific articulable probable cause did not exist at the time the cell phone was seized at approximately 10:13. (R.A.125)

The problem with the Commonwealth's argument is that the SJC has rejected the proposition "that there exists a nexus between a suspect's criminal acts and his or her cellular telephone whenever there is probable cause that the suspect was involved in an offense, [even when] accompanied by an officer's averment that, given the type of crime under investigation, the device likely would contain evidence." Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 750 (2017), citing Commonwealth v. White, 475 Mass. 583, 591 (2016). In Jordan, the court held that the search warrant affidavit contained no probable cause to search for text messages where affidavit

merely established that defendant used a cellular telephone four hours before the killing and used it to contact family members near the time of killing.

In the case at bar, the Commonwealth does not possess any statement from the Defendant or any other reliable source that she committed the crime charged or that she used the phone in the course of, or in the planning of the crime alleged. There are no specific and articulable facts, like the kind found in an affidavit in support of a valid search warrant, to support a probable cause finding that the Defendant's cell phone would contain any admissions or other evidence connecting her to the alleged crime. The Commonwealth does not claim that the alleged victim told the officers that the Defendant was the one who assaulted him or that she was present in the residence when the event occurred. At the point in the investigation where the phone was seized, the Commonwealth's facts are no more specific than the facts in Commonwealth v. White, 475 Mass. 583 (2016) (a warrantless seizure of a cell phone, where the Commonwealth eventually obtained and executed a search warrant).

When the location of the search or seizure is a computer-like device, such as a cellular telephone,

"the opinions of the investigating officers do "not, alone, furnish the requisite nexus between the criminal activity and the [device] to be searched" or seized". Commonwealth v. Anthony, 451 Mass. 59, 72(2008) (search warrant for computer). See and compare Commonwealth v. Kenney, 449 Mass. 840, 846 (2007) ("We do not rely on [the officer's conclusion as to what the facts in the affidavit mean to him... to provide probable cause [to search a computer] where evidence to support such a finding is otherwise lacking").

In order to conduct this kind of a seizure the police first must obtain information that establishes the existence the kind of "particularized evidence" related to the crime, see and compare for example, Commonwealth v. Dorelas, 473 Mass 496, 498-503 (2016)(search warrant case), where the police had specific information that the defendant had received threatening calls and text messages on the cell phone. Commonwealth v. Cruzado, 480 Mass. 275, 282 (2018), a warrantless seizure of a cell phone, where the police had probable cause to believe that the cell phone possessed by the defendant would contain evidence of the crime because they had information that defendant and victim had been together on the day of the murder, the victim's boyfriend had recently overheard defendant

confessing to the murder to an unidentified person on a cell phone, and the cell phone would have been at risk of theft or vandalism given the area where it was found (exigency). The Cruzado case, a warrantless seizure case, indicates that probable cause; an exception to the exclusionary rule (evidence of a crime); and exigency are all required for lawful warrantless search of a cell phone.

In the case at bar the Defendant candidly told the police officers where she had been the night of the alleged assault and that she used her phone while out with friends at specific locations. (R.A. 42,43,51,59) The record as contained within transcript of the Defendant's interview, indicates that her knowledge of the crime charged comes to her through her grandmother and the police department.(R.A. 33 to end). There are no facts in this case for example, the defendant being overheard discussing the crime; threatening calls to or from the alleged victim; witnesses observing the phone used by the defendant during the commission of the crime; or information indicating that any cohorts used their phones to communicate with her during the planning or commission of a crime[2].

[2] Commonwealth v. Arthur, 94 Mass. App. Ct. 161, 162 (2018)

The Commonwealth bases their argument solely on the premise that because the Defendant possessed a phone during some period of time on the evening of the alleged assault on her uncle, that it will contain evidence of the alleged assault. However, White, like Jordan, supra, instructs us that the police "may not rely on the general ubiquitous presence of cellular telephones in daily life, or an inference that friends or associates most often communicate by cellular telephone, as a substitute for particularized information that a specific device contains evidence of a crime." And that "Even where there is probable cause to suspect the defendant of a crime, police may not seize or search his or her cellular telephone to look for evidence unless they have information establishing the existence of particularized evidence likely to be found there." Id. 590-591.

See likewise, Commonwealth v. Morin, 478 Mass. 415, 426 (2017), a search warrant case examining the affidavit for probable cause, citing White, supra, 590-591, where the affidavit in support of a search warrant for the cell phone indicated that the codefendant "made several telephone calls to [the defendant] before and after" the time of the homicide. The court held that at best, the affidavit established a personal

relationship between the individual who brought the victim to the hospital and the defendant, and that they had communicated by cellular telephone before and after the killing, but that nothing in the affidavit indicated the defendant's cellular telephone would contain particular evidence related to the crime under investigation. That while the affidavit indicated the defendant used his cellular telephone at unspecified times to communicate with someone implicated in the crime did elevate "their relationship to a matter of importance in the investigation[;], **it did not, without more, justify intrusion into the content of that communication**". The Morin court held that based on the limited information presented, the affiant's statement that the defendant's telephone would lead to evidence of "the individuals involved" in the victim's death was merely conclusory and did not support a determination of probable cause. See also Commonwealth v. Broom, 474 Mass. 486,496 (2016), another search warrant case where the affidavit failed to point to "particularized evidence" suggesting that the contents of cellular telephone were likely to contain information linking defendant to victim or relating to death of victim.

Commonwealth v. Gentile, 437 Mass. 569,573 (2002), cited by the Commonwealth is not on point with the

facts of this case. In that case the court held that probable cause existed for the warrantless seizure of a truck because, the facts as known to the officers indicates that the victim was in the truck with the defendant; the victim was missing; the defendant was the last person known to have seen the victim in the truck; the defendant's statements to the police were inconsistent, false or implausible; the police noticed a scabbed gouge on the defendant's arm; a scratch that appeared red and fresh; and a discoloration on the defendant's pants.

Commonwealth v. Holley, 478 Mass. 508, 521(2017), another case cited by the Commonwealth and not on point with the case at bar, is another search warrant case in which the court held that the affidavit in support of the warrant contained specific facts supporting the seizure of the contents of text messages from the defendant's phone because during the course of investigation the police learned that the last call made to the victim just before the shooting came from the defendant's phone; other inculpatory text messages were obtained by subpoena; and there was among other evidence, surveillance footage placing the defendant at the scene just prior to the shooting.

The Commonwealth also cites, Commonwealth v. Matias, 440 Mass. 787 (2004), another search warrant case which is factually opposite to the facts known to the police at the time the phone was seized in the case at bar. See Commonwealth v. Perkins, 478 Mass. 97, 105(2017), another search warrant case where the court held that the 221 page affidavit contained specific evidence, gathered by wire taps, that the phones where used to arrange drug transactions. In short, evidence that the phones were actually used in the crime under investigation.

See and compare Arthur, supra 162, where the police observed what appeared to be a concerted effort between three accomplices during an attack on a home involving firearms. The defendants were arrested and two cars, containing cell phones in plain view, were impounded. The court held that there was probable cause that the phones were used to coordinate the attack.

2. WHETHER OR NOT THE COMMONWEALTH MET THEIR BURDEN BY MAKING A SHOWING THAT THE WARRANTLESS SEIZURE FELL WITHIN THE NARROW CLASS OF PERMISSIBLE EXCEPTIONS TO THE WARRANT REQUIREMENT.

Here the Defendant maintains that even if the Commonwealth could show probable cause for the seizure of the phone at the time it was seized, they never applied for or obtained a search warrant for the

warrant and they have not identified any permissible exception to the warrant requirement and an exigency sufficient to dispense with the warrant requirement. Instead the Commonwealth relies on the alleged consent, which the hearing judge held occurred at 10:35 A.M, 22 minutes after, what he found to be the illegal seizure of the phone at 10:13 A.M. (.R.A. 125)

Individuals have an objectively reasonable expectation of privacy in text messages. Commonwealth v. Fulgaim, 477 Mass. 20, 34, cert. denied, 138 S.Ct. 330, 199 L.Ed. 221(2017), citing White, supra 588. It is immaterial as to whether the content of the text messages were obtained through forensic searches of the defendants' cellular telephones or through the records of the cellular telephone service provider, because the police could not seek a warrant in either case without first establishing the nexus between the homicide and the defendant's cellular communications. See Holley, supra, 522 n.19.(case analyzing affidavit in support of search warrant).

The burden is on the Commonwealth to show that the search falls within a narrow class of permissible exceptions to the warrant requirement. Commonwealth v. Craan, 469 Mass. 24, 25 (2014). See Commonwealth v. Mauricio, 477 Mass. 588 (2017) (where the officers

seized digital images from a camera without any showing of an exception to the exclusionary rule, evidence was suppressed.)

The Fourth Amendment and art. 14, guarantee "that every person has the right to be secure against unreasonable searches and seizures" of his or her possessions.[3]

"If the Commonwealth conducts a search or seizure without first obtaining a warrant, the search or seizure is "presumptively unreasonable" and, therefore, presumptively unconstitutional." White, supra, 587-588, citations omitted. "[T]he general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . . ." Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974) citations omitted.

Although police are permitted to hold a seized item for "the relatively short period of time needed … to obtain a search warrant," they must "release the item if a warrant is not obtained within that period." White, supra 593, citations omitted. "We analyze each case on its own facts, "balanc[ing] the nature and quality of the intrusion on the individual's [interests

[3] Commonwealth v. Porter P., 456 Mass. 254, 260 (2010)

under the Fourth Amendment to the United States Constitution] against the importance of the government interests alleged to justify the intrusion." *Id.* at 593-594, citations omitted.

In 2013, the 1st Circuit Court held that absent exigent circumstances even "the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person" U.S. v. Wurie, 728 F.3d 1 (1st Cir. 2013). "Since the time of its framing, "the central concern underlying the Fourth Amendment" has been ensuring that law enforcement officials do not have "unbridled discretion to rummage at will among a person's private effects." Wurie, citations omitted. "Today many Americans store their most personal "papers" and "effects," U.S. Const. amend. IV, in electronic format on a **cell phone**, (emphasis original) carried on the person. "At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" (Wurie, quoting Kyllo v. United States, 522 U.S. 27, 34, 121 S. Ct. 2083, 150 L.Ed. 2nd 94 (2001)). While the Wurie Court did take the time to qualify the kind of exigent circumstances that might allow the police to conduct an immediate, warrantless search of a

cell phone's data as circumstances where there is "probable cause to believe that the phone contains evidence of a crime, as well as a compelling need to act quickly that makes it impracticable for them to obtain a warrant -- for example, where the phone is believed to contain evidence necessary to locate a kidnapped child or to investigate a bombing plot or incident." These kind of exigent circumstances are not present in the case at bar.

The Defendant maintains that White, supra, where the seizure of a cell phone was found to be in violation of the 4th Amendment, contains facts very similar to the case at bar. Like the case at bar the police were investigating a violent crime; suspicion had focused on the defendant as one of the perpetrators of the crime; a detective seized the cell phone to prevent the defendant from retrieving it and removing evidence or destroying the device; and the seizing officer had no information that the cellular telephone had been used to plan, commit, or cover up the crime, or that it contained any evidence of a crime.

CONCLUSION

The Defendant maintains that the seizing officer did not possess sufficient facts to support a probable cause finding that the Defendant had committed the

alleged assault; was involved in the planning or execution of the alleged assault; and that there were exigent circumstances present to bypass the warrant requirement and seize the cell phone.

The exclusionary rule bars the admission of evidence seized in violation of the Fourth Amendment to the United States Constitution[4] or Article 14 of the Massachusetts Declaration of Rights[5]. See Commonwealth v. Bishop, 402 Mass. 449, 451 (1988).

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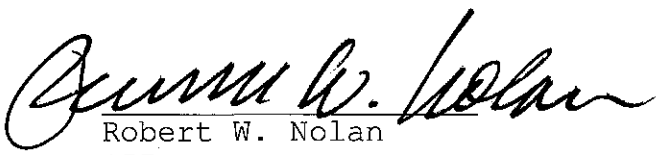
[4] Fourth Amendment to the United States Constitution- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[5] Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

In the present case, the hearing judge did not err in the application of the facts, as he found them to the Constitutional principles and Massachusetts case law.

For the aforementioned reasons the Defendant prays that this Honorable Court affirm the hearing judge's allowance of her Motion to Suppress and that she be awarded attorney's fees and costs associated with defending this appeal.

Respectfully submitted,
Alexa Fencher,
by her Attorney,



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Dated: January 31, 2019

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS

APPEALS COURT
2018-P-1383

COMMONWEALTH
Appellant

V.

M.R.A.P. 16k CERTIFICATION

ALEXA FENCHER
Defendant-Appellee

I, Robert W. Nolan, certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Signed under the pains and penalties of perjury this 31st day of January, 2019.

ROBERT W. NOLAN
BBO# 642206

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS

APPEALS COURT
2018-P-1383

COMMONWEALTH
Appellant

V.

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Defendant-Appellee

CERTIFICATE OF SERVICE

I, Robert W. Nolan, Attorney for the Defendant, hereby certify that I have on this day served a copy of the Appellee's Brief to the Clerk of the Appeals Court, and to the Commonwealth via TylerHost:

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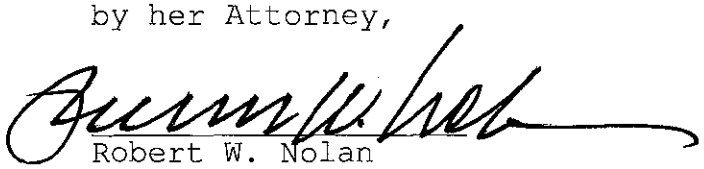
Signed under the pains and penalties of perjury this 31st day of January, 2019.

Respectfully submitted,
Alexa Fencher,
by her Attorney,



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